IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5

ARTHUR F. QUERN, Director Illinois Department of Public Aid, *et al.*,

Appellants,

vs.

DAVID ZBARAZ, M.D., *et al.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

Interest of the *Amicus*

The State of New Jersey is filing a separate *amicus curiae* brief in this matter because the Court's action will have a direct and crucial impact on the necessary flexibility the State's legislative and administrative officials

must be afforded to fashion with limited fiscal resources a medical assistance program providing services deemed most responsive to competing public needs. The decisions of the United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals, as well as other similar decisions which have read far-reaching requirements with respect to allocation of medical assistance funds into the Equal Protection Clause of the Fourteenth Amendment and Title XIX of the Social Security Act, promise to substantially undermine the broad discretionary powers a State must have to fashion welfare programs attuned to the immediate local climate and responsive to competing needs of the poor.

Although New Jersey's limited fiscal resources do not permit it to provide every desirable public assistance service, New Jersey has attempted to provide a sound and publicly acceptable welfare assistance program for medical services by balancing the complex and competing needs of the poor to satisfy the most urgent and necessary of these needs. Thus, in terms of medical assistance the State has, for the present, chosen to provide for those services which it deems medically necessary. In extending such assistance for such controversial services as abortions, the State has followed this present policy and authorized, by Laws of 1975, Chapter 261 (N.J.S.A. 30:4D-6.1), assistance for the termination of a women's pregnancy where "it is medically indicated to be necessary to preserve the woman's life."

Since enactment of that law, the State has been embroiled in almost continuous litigation as to the constitutionality of the coverage policy: initially in federal district court litigation (*Doe* v. *Klein,* Civil Action No. 76-64, ultimately dismissed on the basis of *Maher* v. *Roe,* 432 U.S. 464 (1977); and now in a multifaceted suit pending

in the Superior Court of New Jersey, Chancery Division, (*Right to Choose* v. *Byrne*) in which the plaintiffs have challenged the validity of N.J.S.A. 30:4D-6.1 on the same constitutional and statutory bases raised below in this case. As a result of that litigation, this statutory reimbursement policy has been voided as inconsistent with the alleged mandate of Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* to provide coverage for necessary medical services. *Right to Choose* v. *Byrne,* 165 N.J. Super. 443, 398 A. 2d 587 (Ch. Div. 1979). In accordance with that decision, State administrative officers proposed new guidelines for Medicaid coverage of abortions mirroring the conditions for reimbursement set forth in Pub. L. 95-480, 92 Stat. 1586 (the federal fiscal year 1978 "Hyde Amendment"). In an opinion issued on July 3, 1979 the State court ruled that the failure of the guidelines to provide coverage for all medically necessary abortions violated plaintiffs' "fundamental right" to public benefits for the protection of health "[s]hielded by the Fourteenth Amendment to the Federal Constitution and by Article I, paragraph 1 of the [New Jersey] Constitution against unreasonable and discriminatory restriction . . .", *Right to Choose* v. *Byrne,* 169 N.J. Super. 543, 551-552, 405 A.2d 427, 431-432 (Ch. Div. 1979), thus reaching the same result as was reached in this case by the District Court below. As a result of this decision and Congress' recent resolution barring utilization of federal funds for Medicaid abortions, except in cases of rape and incest and where necessary to preserve the mother's life (H.J.Res. 440), the State will be compelled to provide, in most cases at wholly state expense, Medicaid funds for all abortions deemed medically necessary by a recipient's physician.

Any decision therefore by this Court in the present case will substantially, if not conclusively, determine the outcome of the State's ultimate appeal from the trial court's

ruling in *Right to Choose* v. *Byrne* and the validity of N.J.S.A. 30:4D-6.1. It is clear therefore, that the State of New Jersey has a vital interest in preserving the prerogative of its Legislature to fashion reasonable provisions for such controversial public welfare assistance consistent with the Legislature's views of proper allocation of State resources.

ARGUMENT

POINT I

A legislative decision to deny Medicaid coverage for abortions which are not prompted by life-threatening health concerns advances significant interests of the State and thus comports with the requirements of the Equal Protection Clause of the Fourteenth Amendment.

The ultimate constitutional issue involved in this case is whether equal protection of the law under the Fourteenth Amendment inflexibly mandates governmental officials to allocate public resources for all abortions deemed medically necessary by a physician, irrespective of the gravity of the precipitating health condition, when that government has elected to extend coverage for all other medically necessary services without limitation. As the court below properly recognized, in the aftermath of *Maher* v. *Roe*, 432 U.S. 464 (1977), such a funding limitation cannot be perceived as infringing upon the fundamental right to choose to terminate a pregnancy nor as violating any constitutionally imposed mandate that would require a state to extend medical assistance to the indigent. *Id.* at 469. As with the Connecticut regulation reviewed in *Maher* v. *Roe*, this more restrictive funding limitation "places no obstacles—absolute or otherwise—in the pregnant woman's

path to an abortion . . . she continues as before to be dependent on private sources for the service she desires." In so doing, "[t]he State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." *Id.* at 474. Thus, as in *Maher*, the validity of the funding distinction challenged herein must be judged not under the more exacting scrutiny reserved for State actions impinging upon fundamental rights or creating suspect classifications, but under the more lenient "rational basis" test. If then the governmental decision to fund only those medically necessary abortions prompted by life-threatening health concerns is "rationally related to a constitutionally permissive purpose", the State's action in distinguishing between abortion and other medical services must be upheld. *Id.* at 478.

In this respect, a party who challenges the validity of social legislation under the Equal Protection Clause of the Fourteenth Amendment generally bears the heavy burdent of overcoming the strong presumption of constitutionality attendant to such legislative action. *Jefferson* v. *Hackney*, 406 U.S. 535, 546-547 (1972). As the Court has repeatedly recognized "[s]o long as its judgments are rational and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Ibid.* Particularly in an area such as abortion funding which arouses such intense intellectual, moral and emotional confrontations, the court's function is not to judge the "wisdom or social desirability" of the ultimate policy judgment, *Maher* v. *Roe, supra* at 479, but whether the balance struck is a reasonable one. *Dandridge* v. *Williams*, 397 U.S. 471, 483-486 (1970). The manner in which state welfare funds are

to be expended is a discretionary responsibility of each state, which cannot be disturbed "unless the choice is clearly wrong, a display of arbitary power, [and] not an exercise of judgment." *Mathews* v. *deCastro,* 429 U.S. 181, 185 (1976).

Thus, in *Maher* v. *Roe, supra* the Court upheld the prerogative of legislators to foster the state's "strong and legitimate interest in encouraging normal childbirth" by subsidizing the full costs of childbirth and denying payment for medically unnecessary abortions. While recognizing the difficult plight this policy presented to indigent women who desired to terminate their pregnancy, the Court emphasized that the Constitution did not require any "judicially imposed resolution" of this social problem. On identical grounds in *Poelker* v. *Doe,* 432 U.S. 519 (1977) the Court upheld the right of the City of St. Louis' hospitals to elect to perform only these abortions where there was a "threat of grave physiological injury or death to the mother."

Equally pertinent to this case is the Court's decision in *Gedulig* v. *Aiello,* 417 U.S. 484 (1974). Reaffirming the wide discretion accorded states in the fashioning of appropriate welfare programs, this Court rejected a challenge on equal protection grounds to the provisions of the California employment disability legislation which excluded coverage for pregnancy related disabilities. Recognizing the legitimate concerns of the states in attempting to provide sound programs with limited resources for as many people as possible, the Court upheld the exclusion despite the fact that the California program provided coverage for the full range of other medical disabilities.

The distinction made in the present case between medically necessary abortions not occasioned by life threatening health conditions and all other medical services is

no less a valid exercise of the State's powers to fashion appropriate welfare programs. While it is conceivable as the district court ruled below that this funding limitation may "increase substantially maternal morbidity and mortality among indigent pregnant women" it does not follow, as the court below concluded, that the State's critical interest in preserving potential human life is thereby overborne or rendered irrational. These are precisely the type and kind of choices the Legislature should be free to make.

Indeed in light of the unique consequences of the abortion procedure, it would be reasonable for a state to conclude as a matter of policy not to fund any abortions whatsoever. Rather than adopt such an absolute and unwavering approach, Illinois has struck what its legislators believe to be a humane and reasonable compromise —of acquiescing in the performance of an abortion with public funds only when the mother's life is in jeopardy. That the legislature might have defined more broadly the situations in which maternal health concerns would outweigh fetal life is clear. However, its failure to acquiesce in that policy judgment does not render its decision unsound or an improper exercise of legislative power.

As set forth in the interest of the *amicus* portion of this brief, the duly elected representatives of the New Jersey Legislature, like the Illinois Legislature, have determined to allocate limited public funds to provide assistance for necessary medical services, including abortions required for life-threatening medical conditions, prenatal and other medically necessary childbirth care. This judgment involves areas of controversy primarily entrusted to state government. While the compromise struck by these representatives may not be compatible with individual social concerns, it must be remembered that "the Fourteenth

Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge* v. *Williams, supra* at 486. For this reason, the ruling of the District Court below must be reversed.

POINT II

Title XIX of the Social Security Act authorizes states participating in the federally funded medical assistance program to make judgments based upon significant fiscal, medical and moral concerns as to which medical services will be covered and thus would not preclude in view of the strong state interest in protecting potential fetal life the provision of Medicaid funding solely for those abortions necessary to preserve the life of the mother.

Although the District Court's order below focused on the constitutionality of the federal and Illinois limitation on funding for Medicaid abortions, its order necessarily incorporates the court's previous injunction, as modified by the Seventh Circuit Court of Appeals, that the Illinois statute's funding limitation was not in conformity with the requirements of Title XIX of the Social Security Act because it provided a more limited category of Medicaid funded abortion services. Thus, were this Court to reverse the District Court's constitutional ruling, Illinois nevertheless would be precluded from enforcing its legislatively approved abortion policy and would be required to abide by whatever policy judgments are made by Congress. Since, as a practical matter therefore, the injunction would enforce the prior ruling of the Seventh Circuit and since the Illinois Legislature has not acted to repeal its more limited statutory Medicaid program, review of the underlying Supremacy Clause issue by the Court would be appropriate. See *Quern* v. *Mandley*, 436 U.S. 725, 739 (1978).*

* Additionally the Court's review of the issue of State discretion under Title XIX to determine whether a service is medically necessary and to deny coverage for certain necessary medical treatment within mandated coverage areas is imperative in order to resolve the conflicting interpretations of the statute by federal and state judiciary and the federal Department of Health, Education and Welfare (HEW). Thus, the federal District Court in *Roe* v. *Casey*, 464 F.Supp. 487, 500-502 (E.D. Pa. 1978) has interpreted this Court's characterization of the issue in *Beal* v. *Doe*, 432 U.S. 438, 444 (1977) as raising "serious statutory questions" as a definitive ruling by this Court that State discretion in establishing the parameters of a medical assistance program extended only so far as to allow exclusion or limitation of unnecessary medical services. *Id.* at 501. Again, in *Rush* v. *Parham*, 440 F. Supp. 383 (N.D. Ga 1977), app. pending *sub nom Rush* v. *Poythress*, No. 77-2743 (5th Cir), the court, in invalidating a ban on reimbursement for transsexual surgery, similarly relied upon the *Beal* decision in concluding that "Medicaid coverage is not optional or discretionary for necessary medical treatment of eligible recipients." *Id.* at 389. Additional rulings by state and federal courts, though not finding this Court's *Beal* v. *Doe* ruling dispositive, have interpreted governing federal statutory and regulatory provisions as mandating coverage of all medically necessary services. See *Doe* v. *Busbee*, 471 F.Supp. 1326 (N.D. Ga. 1979); *State* v. *Monmouth Medical Center*, 80 N.J. 299, 403 A.2d. 487 (S.Ct.), *cert.* denied —— U.S. —— (1979); *G.B.* v. *Lackner*, 80 Cal.App. 3d. 64, 145 Cal Rptr. 555 (Ct.App. 1978); *Doe* v. *Minnesota Department of Public Welfare*, 257 N.W. 2d. 816 (Minn. S.Ct. 1977). Contrary readings of the statute however have been adopted. Thus in *Virginia Hospital Association* v. *Kenley*, 427 F. Supp. 781 (E.D.Va.1977) the Court found persuasive HEW's interpretation of Title XIX as authorizing a State Medicaid program's exclusion of coverage of medically necessary inpatient hospital services provided beyond a 21 day limit. Similarly, in *Commonwealth of Pennsylvania Dept. of Public Welfare* v. *Temple*

(Footnote continued on following page)

The determination of the Seventh Circuit Court of Appeals raises what has become an increasingly frequent issue before the Court and other federal and state courts: ascertainment of the proper interplay between federal mandate and state prerogative in a public assistance program developed and funded through cooperative federalism. The specific issue presented—state discretion to set priorities for coverage of medically necessary services—poses the precise question left unresolved in *Beal* v. *Doe*, 432 U.S. 438, 444 (1977), namely the "serious statutory questions . . . presented if a State Medicaid plan excluded necessary medical treatment from its coverage. . . ." The Seventh Circuit Court of Appeals in this matter, adopting the analysis of the First Circuit Court of Appeals in *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121 (1st Cir.), *cert.* denied U.S. (1979), properly concluded initially

(Footnote continued from preceding page)

University, 21 Pa. Commw. Ct. 162, 343 A.2d. 701 (Commw. Ct. 1975) the court upheld the State's denial of medically necessary inpatient hospital coverage beyond 60 days as consistant with the Act. Of particular pertinence herein is the ruling in *D--- R---* v. *Mitchell*, 456 F.Supp. 609 (D. Utah 1978), finding an abortion funding limitation identical to Illinois' consistent with Title XIX requirements. See also *Preterm, Inc.* v. *Dukakis*, 591 F.2d. 121, 125 (1st Cir.), *cert.* denied U.S. (1979).

It is apparent therefore that since the issuance of the *Beal* decision over two years ago, state and federal courts throughout the country have repeatedly grappled with the significant question left open by that decision: the extent of state discretion under Title XIX to deny Medicaid coverage for some medically necessary services. The many conflicting opinions rendered by these courts and particularly those in which HEW approved State plan amendments have been invalidated has created great confusion nationally as to the terms of state participation in the Medicaid program. The time is ripe therefore for the Court's consideration and determination of this question.

that the appropriations section of Title XIX (42 U.S.C. §1396), which authorizes the expenditure of federal money for the purpose of providing medical assistance to indigent persons for the costs of "necessary medical services", did not impose upon any participating state a substantive requirement of coverage for all medically necessary procedures (Aa5; *Preterm, Inc.* v. *Dukakis, supra*, at 124-125). Notwithstanding this recognition of the discretion Congress intended to afford the states in fashioning a medical assistance program, both the First and Seventh Circuit Courts of Appeal nevertheless proceeded to construe an additional provision of Title XIX, 42 U.S.C. §1396a (a) (17), which requires the establishment of "reasonable standards . . . for determining the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]" and interpretative regulations of HEW, 42 C.F.R. §440.230, as in effect precluding states from exercising any discretion as to the coverage of medically necessary procedures. In reliance upon these provisions, it was concluded that no "rational social objective" would be served by a limitation upon medical assistance for abortion services beyond that imposed by Congress and that therefore a statutory program which limited Medicaid funding to abortions necessary to preserve the life of the mother was inconsistent with Title XIX, as amended by the Hyde Amendment. *Id.* at 126.*

In concluding that Title XIX precludes any limitation of abortion coverage other than that imposed by Congress and thereby removing from state elected officials the discretion to fashion a medical assistance program it deems most attuned and responsive to the particular needs and competing demands of its poor, these courts have miscon-

* Herein the courts concluded that the Congressional definition of an appropriate level of coverage would be the standards adopted in the Hyde Amendment.

strued governing federal Medicaid coverage provisions, ignored the interpretation of these provisions advanced by the federal agency which administers the Medicaid program as well as the teachings of this Court in *Maher* v. *Roe, supra,* and *Quern* v. *Mandley,* 436 U.S. 725 (1978) which mandate federal courts to construe Congressional grants of discretionary authority to the states in a generous and not restrictive fashion. By so reading Title XIX, these courts have utterly usurped the prerogative of states to fashion medical assistance programs, as a whole and not only with regard to abortion services, in accordance with reasonably perceived needs of the Medicaid population. More appropriately, the State of New Jersey submits, this statute must be construed as affording states broad latitude in limiting coverage based upon legitimate and reasonable fiscal, medical, moral or State policy bases.

In choosing to afford to certain groups of its needy citizens the benefits provided under the federally-assisted and state administered medical assistance program, a participating state must agree to reimburse providers of inpatient hospital services for the "*payment of part* or all of the costs" of these services, 42 U.S.C. §1396d(a) (emphasis added). See also 42 U.S.C. §1396a(a)(1), 42 U.S.C. §1396a(a)(13)(B). As is evident from the limiting language of 42 U.S.C. §1396d(a) and the reference in 42 U.S.C. §1396 to the state's provision of "medical assistance" "*as far as practicable under the conditions in such state*" (emphasis added), Congress clearly was not mandating comprehensive coverage of any category of care. See also *Beal* v. *Doe, supra* at 441. Again the statement in 42 U.S.C. §1396a(a)(13)(D) referring to "inpatient hospital services provided under the [State] plan" emphasizes the Congressional intent to afford participating states broad discretion in fashioning the parameters of its mandatory services coverage.

The limited federal objectives are further apparent from the legislative history of the program. As originally enacted Title XIX would have required participating states to move toward, and eventually to furnish, "comprehensive care and services to substantially all individuals who [met] the plan's eligibility standard with respect to income and resources" by July 1, 1975. 42 U.S.C. §1396b(e), as enacted by Social Security Amendments of 1965, Title XIX, §1903(e), Pub. L. 89-97, 79 Stat. 286, 350. Recognizing the significant and increasing burden of Medicaid costs upon State finances, Congress in 1972 enacted a number of amendments to Title XIX for the express purpose of affording states fiscal relief and additional administrative latitude. Included in these amendments was a provision which repealed section 1903(e). Social Security Amendments of 1972, Pub. L. 92-603, Title II §230, 86 Stat. 1329 (1972). For similar reasons, Congress repealed section 1902 (1) which barred state reduction of approved expenditures from one year to the next. By enacting and then repealing these sections, Congress thus made clear that Title XIX in its current form does not require comprehensive coverage even of mandatory services.

The correctness of the First and Seventh Circuits' interpretation of 42 U.S.C. §1396, as allowing state discretion in determining coverage of medical services falling within mandated categories of care, is further substantiated by the Court's ruling in *Quern* v. *Mandley, supra.* Therein the Court considered whether the definition of "emergency aid to needy families with children" es forth in 42 U.S.C. §606(e) imposed mandatory conditions of eligibility for every state Emergency Assistance program. Concluding to the contrary, this Court noted that a literal implementation of public welfare programs as broadly defined in the general purposes clauses of the

various Social Security Act chapters "would create . . . entirely open-ended program[s], not susceptible of meaningful fiscal or programmatic control by the states." *Id.* at 746. A more reasonable Congressional objective, this Court opined, was the establishment through these provisions of permissible limits of federal spending, rather than the definition of mandatory coverage areas for participating states. *Id.* at 745. Consistent with these principles of construction this Court interpreted the language of 42 U.S.C.§ 1397, the appropriations section for Title XX Social Services programs, whose declared purpose was to "encourage[ ] each state, *as far as practicable under the conditions in that State* to furnish services directed at the goal of . . . achieving or maintaining economic self-support to prevent, reduce or eliminate dependency" (emphasis supplied), as an expression of Congressional intent to delegate to the state ultimate decision-making authority in establishing priorities within the constraints of federal funding limitations." *Id.* at 745.

Similarly, the lone appearance of the term "necessary medical services" in the almost identically worded appropriation section for the federal Medicaid statute (42 U.S.C. §1396) cannot be viewed as imposing a substantive coverage requirement. As with the appropriation sections of Title XX and the Emergency Assistance definition, the use of the term "necessary medical services" simply specifies the type of services for which federal matching funds will be available. It does not establish the minimum limits of a participating state's mandatory service coverage.

The failure of the Title XIX legislature to prescribe minimum levels of coverage and its use of such broad phrases as "reasonable" and "consistent with the objectives of the Act" certainly belies any intent on the part

of Congress to limit in any significant manner exercise of state discretion in determining an appropriate level of coverage. As the Court noted in *N. Y. State Dept. of Social Services* v. *Dublino,* 413 U.S. 405 (1973), where there exists no "direct and unambiguous language . . . either in the federal statute or in the Committee reports . . ." evidencing such a limitation, a Congressional intent to preempt State discretion should not be presumed *Id.* at 414. Similarly, had Congress intended to preempt the exercise of state discretion as to coverage of abortion services, it would have clearly stated its objectives by succinctly defining both federal standards as well as the permissive areas of discretion reserved to the states. Like the Work Incentive Program reviewed in *Dublino,* "no such expression exists" in Title XIX. *Id.* at 417.

In view of the above lack of Congressional definition of the required amount of care and services or any specific direction to the Secretary of HEW to prescribe such definitions, the Secretary has largely left to state discretion the formulation of state plans for coverage. See *Virginia Hospital Association* v. *Kenley, supra.* A state plan thus must

> "Specify the amount and/or duration of each item of medical and remedial care and services that will be provided to the categorically needy and to the medically needy, if the plan includes this latter group. *Such items must be sufficient in amount, duration, and scope to reasonably achieve their purpose.* With respect to [these] required services . . . the State may not arbitrarily deny or reduce the amount, duration or scope of such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition. *Appropriate limits may be placed on services based on such*

criteria as medical necessity or those contained in utilization or medical review procedures." 42 C.F.R. § 449.10(a)(5)(i). (Emphasis supplied.)

It is apparent from the above regulation and the arguments it has presented in *Virginia Hospital Association* v. *Kenley, supra* and *Rush* v. *Parham, supra* that HEW does not view medical necessity as the sole basis upon which coverage of mandatory services may be limited. Indeed the State is free to place other "appropriate" limits upon mandatory service coverage.* Thus, contrary to the theory set forth in the opinion below, *Rush* v. *Parham, supra,* and *Doe* v. *Busbee, supra,* where a state can reasonably justify upon an appropriate policy basis a limitation upon coverage as permitted by the last paragraph of §449.10 (a)(5)(i), it is evident that the reduction of the affected services does not arise "solely because of the diagnosis or type of condition" and does not constitute an arbitrary denial or reduction in the "amount, duration or scope of such services."

Therefore the sole basis upon which a state limitation of coverage can be overturned is if it fails to advance a significant and rational State policy. In the area of abortion coverage it is evident that states have significant concerns regarding the use of state monies to fund abortions. Indeed, as this Court has previously recognized, there is nothing "in either the language or legislative history of Title XIX . . . [which] suggests that it is unreasonable for a participating state to further [the] unquestionably strong and legitimate interest in encouraging normal childbirth." *Beal* v. *Doe, supra* at 446. In view of the above

* Of course the interpretation of the federal statute by HEW should be accorded great deference by the Court. See *N.L.R.B.* v. *Bell Aerospace Co.,* 416 U.S. 267 (1974).

and the arguments presented in Point I *supra, amicus* submits that a state's denial of Medicaid funds for abortions for non-life-threatening health conditions is clearly justified as against any claim of arbitrariness. Accordingly, this Court must conclude that the denial of Medicaid funds for medically necessary abortions other than those required by health conditions threatening the life of the mother is both a reasonable and appropriate exercise of state discretionary power vested by the Social Security Act.*

CONCLUSION

The Seventh Circuit Court of Appeals improperly construed Title XIX of the Social Security Act and the Hyde Amendment as barring participating Medicaid states the discretion to limit coverage of abortions to those necessary to preserve life of the mother. Furthermore, the District Court's conclusion that the denial of Medicaid cover-

* It is amicus' position that the history of the Hyde Amendment merely confirms the fact that Congress never intended to mandate comprehensive coverage of "medically necessary" abortions. See e. g. 123 Cong. Rec. H. 12653 (Daily Ed. December 6, 1977) (Rep. Michel: ". . . I well know that in Cook County . . . they are taking care of situations that we are prohibiting here, but they feel a need locally to do it and if there are no federal funds, I have no voice in it. . . ."); 123 Cong. Rec. H 10835 (Daily Ed. October 12, 1977) (Rep. Early: ". . . I believe that it is not the Federal Government's place to provide funds for abortions. Should the majority of the residents of individual states choose to spend their State tax dollars to fund abortions, that is their right.")

Were this Court however to determine *contra, amicus* submits that the ruling below as well as the *Preterm* opinion are persuasive that the Hyde Amendment does constitute a substantive amendment of this requirement.

age for all abortions deemed medically necessary by a physician violates the equal protection clause of the Fourteenth Amendment failed to give proper consideration to the court's ruling in *Maher* v. *Roe,* 432 U.S. 464 (1977), *Gedulig* v. *Aiello,* 417 U.S. 484 (1974), *Jefferson* v. *Hackney,* 406 U.S. 535 (1972), and *Dandridge* v. *Williams,* 397 U.S. 471 (1970). It is respectfully submitted that the application of the principles enunciated in these cases clearly demonstrates that the decision below is erroneous and should be reversed.

Respectfully submitted,

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